Supreme Court of the United States

OCTOBER TERM, 1951

No. 83

ANTONIO RICHARD ROCHIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

FRED OKRAND,
A. L. WIRIN,
257 South Spring St.,
Los Angeles 12, California,

NANETTE DEMBITZ,
170 Fifth Ave.,
New York 10, N. Y.,

Attorneys for American Civil Liberties Union.

EDMUND W. COOKE,
EDWARD J. ENNIS,
MORRIS L. ERNST,
OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
HERBERT M. LEVY,
CLORE WARNE,
of Counsel.

INDEX

	PAGE.
INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE	1
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
Facts	2
Judgment of the Trial Court	3
Opinion of the District Court of Appeal	3
Opinions in Supreme Court of California	4
QUESTION PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT—The use of the capsules extracted from petitioner to secure his conviction was a violation of the due process guarantee of the Fourteenth Amendment	7
A. The forcible extraction of the capsules from petitioner was a violation of due process	8
B. Use of the capsules to convict petitioner was as clearly a violation of due process as was their extraction from him	11
No Sufficient Remedy Other than Exclusion of Evidence	12
CONCLUSION	16

TABLE OF CASES

PAGE

Adamson v. California, 332 U. S. 46, 54 12

Francis v. Resweber, 329 U. S. 459 9

Glasser v. United States, 315 U. S. 60, 71 10

Haley v. Ohio, 332 U. S. 596, 604 ..... 7, 11

Harriss v. South Carolina, 338 U. S. 49, 62, and 68 .. 11

Lisenba v. California, 314 U. S. 219 11

McDonald v. United States, 335 U. S. 451, 453 9

von Moltke v. Gillies, 332 U. S. 708, 723 10

Mooney v. Holohan, 294 U. S. 163, 170 13

People v. One 1941 Mercury Sedan, 74 Cal. App. (2d) 199, decided in 1941 13

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 15

Taylor v. Alabama, 335 U. S. 252 13

United States v. Di Re, 332 U. S. 581, 582 9

Watts v. Indiana, 338 U. S. 49, 55 ..... 6, 8, 11

Wolf v. Colorado, 338 U. S. 25 ..... 6, 7, 8, 9, 11, 12, 13, 14, 15

STATUTES AND AUTHORITIES

Judicial Code of 1948 (28 U. S. C. 1257(3)) 2

Perlman, Due Process and the Admissibility of Evidence, 64 (1951), Harvard Law Review 1304, 1308-10 11

Supreme Court of the United States

OCTOBER TERM, 1951

No. 83

ANTONIO RICHARD ROCHIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of the American Civil Liberties Union as *Amicus Curiae*

The American Civil Liberties Union, appearing as *amicus curiae* with the consent of both parties, is a nation-wide nonpartisan organization dedicated to the preservation and nurture of the Constitutional rights fundamental to the democratic way of life. We believe that California denied petitioner the minimum of respect for the dignity and privacy of the individual required by the democratic concept of the individual's status in the State, and that his conviction was a violation of the due process of law guaranteed by the Constitution.

Opinions Below

The opinion of the District Court of Appeal (R. 180-184) is reported at 101 A. C. A. 163, 225 P. 2d 1. The opinions of the two judges who dissented from the order of the California Supreme Court denying a hearing to petitioner (R. 184-192), are reported at 36 A. C. 553-560.

Jurisdiction

This Court, acting under Section 1257(3) of the Judicial Code of 1948 (28 U. S. C. 1257(3)), granted petitioner's petition for a writ of certiorari to the District Court of Appeal of California on May 28, 1951 (R. 193). The objections under the Federal Constitution to petitioner's conviction which are now being urged were presented to the trial court, the District Court of Appeal, and the Supreme Court of California, which in its discretionary power declined to grant a hearing.

Statement of the Case

Facts

The uncontroverted facts, substantially as stated by the District Court of Appeal (R. 181) and admitted both by respondent's witnesses and in its briefs, are that three deputy sheriffs of Los Angeles County, California, broke into petitioner's bedroom, without a warrant, on the morning of July 1, 1949 (R. 10, 25). One of the sheriffs testified that when he said "Whose stuff is this?", referring to two capsules lying on a table, petitioner grabbed them and appeared to put them in his mouth, although the offi-

cers also suspected he might have thrown them under the bed (R. 9-10, 32-34). The three sheriffs jumped on the petitioner, grabbed him by the neck, and squeezed his throat to attempt to discover the capsules (R. 29-31). When they did not thus find the capsules, they handcuffed petitioner, and one of the sheriffs took him by car to the operating room of a hospital (R. 36). Still handcuffed, petitioner was strapped to the operating table by a doctor's assistant (R. 35). At the sheriff's direction, a doctor then inserted a rubber tube about a foot long down petitioner's throat and injected into his stomach through the tube a chemical solution (37, 39); this caused him to vomit and the sheriff found the two capsules he had been seeking in the vomited matter (R. 10, 39). Upon analysis these capsules were found to contain morphine (R. 45).

Petitioner was thereupon convicted and sentenced to prison for possessing a preparation of morphine in violation of State law (R. 1, 4). Major evidence against him were the capsules which had been forcibly secured from his stomach and the testimony of a State chemist that they contained morphine (R. 45).

Judgment of the Trial Court

The trial court, sitting without a jury, found petitioner guilty, holding that under the decisions of the California Supreme Court, the State's highest court, the capsules and the analysis of their contents were admissible in evidence, even if they had been unconstitutionally extracted from petitioner (R. 149-154).

Opinion of the District Court of Appeal

The District Court of Appeal, reciting the facts as stated above with respect to the use of a stomach pump

upon petitioner, vigorously condemned the method by which the incriminating evidence against him was obtained, saying: "Under the record here, deputy Jack Jones and the alleged doctor of medicine, Mier, were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital" (R. 183). It agreed with the trial court, however, that the case was governed by the California Supreme Court's holdings that the courts are not to consider the procedure by which evidence has been obtained in determining whether a conviction can be based upon it.

The concurring judge stated that though "the record * * * reveals a shocking series of violations of constitutional rights * * * I am bound by the decisions of the Supreme Court which, unfortunately, have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts" (R. 184).

Opinions in Supreme Court of California

Two judges dissented from the order of the Supreme Court of California denying a hearing. Judge Carter pointed out that no one could "imagine such right [of privacy] being any more ruthlessly violated under a totalitarian regime than it was in the case at bar", and that the ruling that the evidence was nevertheless admissible "gives aid and comfort" to law enforcement officers who "ruthlessly violate * * * [the constitutional provisions] with impunity" (R. 186, 185). Judge Schauer rested his dissent mainly on the conclusion that "a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse" (R. 191).

Question Presented

Whether the conviction of the petitioner upon the basis of the capsules extracted from him by force was in accordance with the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Summary of Argument

I. The due process guarantee of the Fourteenth Amendment prohibits the acquisition of evidence by the means used on petitioner: by the police seizing him, inserting an instrument and injecting a chemical into the internal organs of his body, and forcing him to emit. For due process precludes such a gross invasion of privacy and such a physical debasement of the individual in the administration of justice. Further, due process has never been deemed to countenance a method of seeking evidence that entailed such a penetrating assault upon a suspect's body with the possibility of such gross physical and psychological damage, as forcible application of the stomach pump.

If police resort to the stomach pump were accepted, its use against innocent people whom the police mistakenly believe to have swallowed incriminating matter, would have to be countenanced, as well as against those who turn out to be guilty. The likelihood of mistakes or recklessness by the police is highlighted by the Constitutional provisions for search warrants, which were established as a protection against arbitrary intrusions by the police. Since prior judicial authorization could not be held a req-

uisite for use of the stomach pump due to the emergency character of this operation, even if it were categorized as a "search", the hazard of mistakes by the police in subjecting individuals to the pump would be considerable.

II. Use of the capsules extracted from petitioner to secure his conviction is as much a violation of due process as the extraction itself. Due process not only bars a police procedure that is inconsistent with our basic concepts of proper criminal administration, but also "vitiates a conviction based on the fruits of such procedure." *Watts* v. *Indiana*, 338 U. S. 49, 55. The issue here is strikingly and significantly different from that in *Wolf* v. *Colorado*, 338 U. S. 25, where it was held that due process did not prohibit use of account books secured through a search and seizure in defendant's office, which violated due process in that it was undertaken without a search warrant. Here the violation of due process by which the evidence was obtained involved application of force to the person of the defendant; and the many precedents of this Court establishing the invalidity of a conviction based on evidence obtained from defendant by force overcoming his will and volition, must be followed. As in those cases, the pre-trial treatment of the petitioner must be deemed an integral part of the procedure leading to his conviction and requires its reversal.

The *Wolf* ruling as to the admissibility of the evidence there involved would in any event be inapplicable here, because that opinion acknowledges that under the circumstances at bar due process would require exclusion of the evidence. For the Court in the *Wolf* decision fully recognizes that the due process clause requires the

State to provide an effective remedy for its violations; that the most effective remedy for a violation of due process in the seizure of evidence is its exclusion at the trial; and that exclusion would therefore be required if there were no other sufficiently effective remedies for the violation of due process committed in securing the evidence. Contrary to the Court's conclusion with respect to the violation at issue in the *Wolf* case, there is no effective deterrent or remedy for the police practice in the case at bar other than exclusion of the evidence. Unless use of evidence obtained by forcible application of the stomach pump is barred as a violation of due process, the State will continue to deny due process in its procedures for obtaining evidence, by continuing to subject suspected individuals to this instrument.

ARGUMENT

THE USE OF THE CAPSULES EXTRACTED FROM PETITIONER TO SECURE HIS CONVICTION WAS A VIOLATION OF THE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT.

The due process guarantee of the Fourteenth Amendment means that the "procedures [leading to convictions] cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community." *Haley* v. *Ohio*, 332 U. S. 596, 604 (Justice Frankfurter's concurrence). The "due process clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, * * * [because] the due process clause * * * [has the] historic function of assuring

appropriate procedure before liberty is curtailed or life is taken." *Watts* v. *Indiana*, 338 U. S. 49, 55.

For the State to convict a defendant as it did here, upon evidence secured by seizing him, inserting an instrument and injecting a chemical into his internal organs, and forcing him to emit, assuredly is shocking to our basic concepts of appropriate procedure. Under our system of justice a man does not become a mere object to be used as the State wills, because he is suspect of violating the law, nor can the State utterly abandon respect for the physical privacy of his person. As Judge Carter of the California Supreme Court put it: "Could anyone imagine such right [of privacy] being any more ruthlessly violated under a totalitarian regime than it was in the case at bar?" (R. 186). For, by such police methods as the stomach pump our concept of each person as an individual and integrated being, in control of his own faculties and volition, is subverted and he is instead treated as a mere physical organism to be manipulated by others. As when drugs are administered by the totalitarian regimes to extract confessions, the State makes Man an automaton, with the State the Master and director of his functions; regard for his identity as a responsible individual is sacrificed to the administration of the law.

A. The forcible extraction of the capsules from petitioner was a violation of due process.

The procedure used against petitioner must be deemed prohibited by due process as a flagrant violation of the right to "privacy * * * [which is] implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf* v. *Colorado*, 338 U. S. 25, 27-28. Our Constitution condemns "a

too permeating police surveillance * * * (as) a greater danger to a free people than the escape of some criminals from justice." *United States* v. *Di Re*, 332 U. S. 581, 582. As in the *Wolf* and *Di Re* cases, where the police methods likewise succeeded in securing the wanted evidence, the success of the particular search at bar must not be allowed to obfuscate the principle. If police resort to the stomach pump were countenanced, it could legitimately be used against innocent people whom the police mistakenly believe to have swallowed incriminating matter, as well as against those who turn out to be guilty. The likelihood of mistakes or recklessness by the police in searches for evidence is so great that the Constitutional requirements of search warrants were provided as a protection against this hazard. *McDonald* v. *United States*, 335 U. S. 451, 453; *Wolf* v. *Colorado*, 338 U. S. 25, 27. Since prior judicial authorization could not be held a requisite for use of the stomach pump due to the emergency character of this operation (see R. 118), even if it were categorized as a "search", the danger of mistakes by the police in subjecting individuals to the pump would be considerable.

The extraction of the capsules from petitioner must also be deemed unconstitutional because due process proscribes such an extreme assault and physical debasement of the individual in the administration of justice as here occurred. *Francis* v. *Resweber*, 329 U. S. 459.[1] And no method of obtaining evidence has heretofore been deemed due process that entailed the possibility of physical and psychological damage in any way comparable to that from forcible use of

[1] In that case all of the Justices indicated that the due process clause of the Fourteenth Amendment prohibited cruel and unusual punishment, although the majority was not of the opinion that it had there been inflicted.

the stomach pump;[2] the psychological effect would be particularly severe in the event the police mistakenly subject an innocent person to the pumping operation. And because of its menacing aspects, to countenance stomach pumping would be to legalize a means for coercing confessions; for apprehension of this operation, which could then be threatened whenever the police purport to believe that incriminating matter has been swallowed, would be intimidating and destructive of the free choice of many suspects.

It is not necessary for the purposes of this case to hold that under no conceivable circumstances can the police perform such an operation upon a person's body as was performed upon petitioner. Certainly, however, where as here the matter the police are seeking is sought only as evidence, and not for its intrinsic value, forcible use of the stomach pump must be barred. Police discretion to so severely violate the privacy, dignity, and physical and mental well-being of the individual for relatively routine and trivial purposes cannot be deemed due process.[3]

---

[2] Compare cases cited infra, note 4. Resort to an inexpert or bogus doctor, which could well occur if stomach pumping were countenanced, and, indeed, according to the District Court of Appeal's intimation, occurred in the instant case (R. 181, 183), would increase the hazard of physical damage.

[3] Respondent has suggested that petitioner may have waived his constitutional objections by submitting to the stomach pump without voicing a protest. But his submission under such overpowering circumstances,—he was handcuffed, in a hospital operating room, and surrounded by hospital attendants as well as the sheriff,—more likely reflected fear than acquiescence, and certainly could not be deemed an intelligent, free, and unequivocal waiver of a right not to have the capsules extracted from him for use as evidence. Compare *von Moltke* v. *Gillies*, 332 U. S. 708, 723; *Glasser* v. *United States*, 315 U. S. 60, 71. It was stipulated that petitioner would have testified that his stomach was pumped against his will and consent (R. 158). It is clear that the trial court assumed that he submitted to the pump only because he was forced to do so (R. 149-154), and this fact is an explicit premise of the decision of the District Court of Appeal here under review (R. 183).

B. Use of the capsules to convict petitioner was as clearly a violation of due process as was their extraction from him.

For the State to use the evidence forcibly extracted from the petitioner to convict him is as shocking and as much a violation of due process as the extraction itself. For the due process clause not only bars police procedure that is unacceptable to our basic concepts of a proper criminal system, but also "vitiates a conviction based on the fruits of such procedure." *Watts* v. *Indiana*, 338 U. S. 49, 55. It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, this Court held that due process did not prohibit conviction of a man on evidence obtained by a search of his office and seizure of his account books, though the search and seizure violated due process because unauthorized by warrant. But there the procedure violative of due process was removed from the person of the defendant; it did not, as in the instant case, involve the application of force to his person.

This Court has held in a long series of cases that the due process guaranteed by the Fourteenth Amendment precludes the use of evidence obtained from the defendant by force overcoming his will and volition,[4] or by "any

[4] E.g., *Lisenba* v. *California*, 314 U. S. 219; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, *Turner* v. *Pennsylvania*, and *Harriss* v. *South Carolina*, 338 U. S. 49, 62, and 68. While these decisions involved the use of coerced confessions, their rationale did not lie in the falsity of the confessions, but rather in the inconsistency of the coercive methods there used to obtain evidence with our basic concepts of the proper relationship of the State to suspected criminals. See in particular *Watts* v. *Indiana*, at p. 50, n. 2: "But a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true." See Perlman, *Due Process and the Admissibility of Evidence*, 64 (1951) Harvard Law Review 1304, 1308-10, agreeing with the foregoing statement of the rationale of the decisions. And see opinion of Judge Schauer of the California Supreme Court, R. 192.

type of coercion that falls within the scope of due process." *Adamson* v. *California*, 332 U. S. 46, 54. Certainly the procedure used to extract the evidence in the case at bar was the quintessence of force overcoming the defendant's will and volition. The lack of due process here lay, as in the cited cases, in the use of a type of coercion against the defendant which was beyond the possibility of validation, rather than, as in the *Wolf* case, in the mere failure of the police to obtain a warrant, which would have validated the seizure of the evidence. And as in the cited cases the evidence here must be deemed tainted with this essential invalidity. Again, as in the cited cases of coercion upon the defendant, it was in the pre-trial treatment of petitioner himself in which there was a violation of due process; here as there such treatment must be deemed an integral part of the procedure leading to the conviction and cannot be separated from it. Accordingly, the conviction must be reversed.

No Sufficient Remedy Other than Exclusion of Evidence

Aside from the significant differences between the due process issue here involved and that in the *Wolf* case, the *Wolf* ruling as to the admissibility of the evidence would in any event be inapplicable here, in view of the Court's recognition in that opinion that under appropriate circumstances—which we believe are here present—exclusion of the evidence would be required by due process. For the *Wolf* opinion fully acknowledges that exclusion of unconstitutionally obtained evidence is the most effective remedy and deterrent for the constitutional transgression, and that exclusion would have to be enforced if there were no other sufficiently effective remedies. Indeed, any other

conclusion would deny the fundamental principle that the Federal Constitution guarantees due process as an active functioning mechanism and not as a mere abstract right.[5]

In *Wolf*, however, the majority believed that there were sufficiently effective remedies other than exclusion of the evidence, for the violation of due process committed in securing it, pointing especially to the possibility of disciplinary action against the police (338 U. S. at p. 32). But whatever might be the likelihood of disciplinary action in the *Wolf* situation—a likelihood much deprecated by the dissenters—it is so much more unlikely in the instant situation that it cannot realistically be deemed even a possible remedy. For while the failure to obtain a warrant in a particular instance might be the determination of an individual officer, whose superiors might conceivably take action against him, an extraordinary method of securing evidence, such as the stomach pump, would hardly be undertaken without the approval of the officials responsible for police methods. It is clear that police use of the stomach pump is officially approved in California (see R. 41-2, 36);[6] no disciplinary action was taken against the sheriffs involved in the instant case nor is any punishment known to have ever been imposed for such constitutional violations by the police.

---

[5] See *Mooney* v. *Holohan*, 294 U. S. 163, 170; *Taylor* v. *Alabama*, 335 U. S. 252.

[6] And see *People* v. *One 1941 Mercury Sedan*, 74 Cal. App. (2d) 199, decided in 1941, in which evidence had similarly been secured by means of a stomach pump and was admitted at the trial.

The possibility of any change in police policy is made more remote by the fact that the California Supreme Court, as a result of its ruling that evidence need not be excluded though unconstitutionally obtained, has not even found it necessary to pass on the constitutionality of stomach pumping since the issue has only been presented in connection with the validity of convictions.

The decision of the District Court of Appeal here under review, following the rigid view of the California Supreme Court that the source of evidence does not affect its admissibility, ignores the issue of whether there are sufficiently effective remedies for the violation of due process other than exclusion of the evidence, which under the *Wolf* decision should have been a crucial part of its consideration. The California judges who did consider this issue: the concurring judge in the District Court of Appeal and the dissenting judges in the Supreme Court—pointed out that "the decisions [not to exclude unconstitutionally obtained evidence] have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts" (R. 184); that these decisions give "aid and comfort to so-called officers of the law who are so lacking in respect for the constitutional provisions here involved that they ruthlessly violate them with impunity" (R. 185); and that the officers will repeat their practice in the instant case "again and again if the courts continue to hold that the evidence they obtain by such unlawful means may be used in criminal prosecutions" (R. 186). In short, unless the instant conviction based on evidence extracted from defendant by force overcoming his will and volition is held to violate due process, there will be no effective remedy for the violation of due process committed in securing the evidence; the stomach pump to extract evidence will continue in use; and the due process guarantee will be nominal only.

Finally, it is to be noted that the *Wolf* opinion mentions as a reason for not requiring exclusion of the evidence there seized without a warrant, that the incidence

of such seizures might be so small in a particular jurisdiction that less effective remedies than exclusion could be deemed sufficient to assure a general maintenance of due process (338 U. S. at pp. 31-32). In the case at bar, however, the violation of due process is of such a drastic nature that even its sporadic occurrence cannot be tolerated; the minimum standards of acceptable procedure call for the complete extirpation of this reprehensible method of securing evidence, and thus for the employment of the most effective remedy available.

It is self-evident that exclusion of evidence extracted with a stomach pump is the effective and appropriate way to deter the police from resorting to the pump since there would be no purpose or reason in attempting to thus obtain evidence if it could not be used. "The essence of a provision forbidding the acquisition of evidence in a certain way is that * * * evidence so acquired * * * shall not be used at all." Otherwise the prohibition is a mere "form of words". *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. Accordingly the capsules acquired from petitioner in violation of due process of law should have been excluded from evidence and his conviction must be reversed.

CONCLUSION

It is respectfully submitted that the conviction of petitioner must be reversed.

FRED OKRAND,
A. L. WIRIN,
257 South Spring St.,
Los Angeles 12, California,

NANETTE DEMBITZ,
Suite 900,
170 Fifth Ave.,
New York 10, N. Y.,

Attorneys for American Civil Liberties Union.

EDMUND W. COOKE,
EDWARD J. ENNIS,
MORRIS L. ERNST,
OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
HERBERT M. LEVY,
CLORE WARNE,
of Counsel.